HCA 2337/2016
[2022] HKCFI 642

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 2337 OF 2016

BETWEEN

KOO MING KOWN	Plaintiff
and	
REV. MR. MOK KONG TING (President of the Baptist Convention of Hong Kong)	1st Defendant
REV. MR. LAM SAU KWONG	2nd Defendant (Dismissed)
CHAN CHI MONG, HOPKINS	3rd Defendant
THE BAPTIST CONVENTION OF HONG KONG	4th Defendant

Before: Hon Cheng J in Chambers

Date of Hearing: 17 January 2022

Date of Judgment: 21 March 2022

J U D G M E N T

A. THE APPLICATIONS

1. By a summons of 22 July 2021, the 1st and 4th Defendants apply to strike out the Plaintiff's Re-Re-Amended Writ and Re-Re-Amended Statement of Claim as scandalous, frivolous or vexatious, an abuse of process and/or disclosing no reasonable cause of action.

2. The Plaintiff had earlier issued a summons on 23 April 2021, seeking leave to amend the Re-Re-Amended Writ and Re-Re-Amended Statement of Claim, and a summons of 10 January 2022, seeking leave to replace the draft Re-Re-Re-Amended Writ and Re-Re-Re-Amended Statement of Claim with a revised version.

3. At the hearing, the 1st and 4th Defendants did not oppose the Plaintiff's applications (and the 3rd Defendant, who did not attend, indicated the same position by way of letter). I therefore allowed the Plaintiff's applications, with the costs of and occasioned by the summonses to be paid by the Plaintiff to the 1st, 3rd and 4th Defendants. The strike-out application was argued by reference to the Re-Re-Re-Amended Statement of Claim ("**the RRRASOC**").

B. THE BACKGROUND

4. The Plaintiff is an alumnus of the Hong Kong Pui Ching Primary School ("**the Primary School**") and the Hong Kong Pui Ching Middle School ("**the Middle School**") (collectively, "**the Schools**").

5. Paragraph 1C of the RRRASOC pleads that the 4th Defendant is the sponsoring body, as defined under the Education Ordinance

(Cap. 279) ("**the EO**"), of the Schools, and manages and operates the Schools. It is further pleaded that the 4th Defendant administers the Schools through its appointment of the members of the management committees of the Schools or their managers, as well as their supervisors and principals. It is said that the 4th Defendant has *de facto* and ultimate control of the management and affairs of the Schools through the supervisors, managers and principals that it appoints.

6. It is pleaded in RRRASOC paragraph 2 that the 1st Defendant is the Chairman of the 4th Defendant. The 1st Defendant has filed evidence stating that he was the president of the 4th Defendant between 2014 and 2017 (when some of the events which are the subject of the proceedings occurred), and that he is currently a director of the 4th Defendant.

7. The 3rd Defendant was the supervisor (as defined under the EO) of the Schools from about September 2010 to August 2018 (RRRASOC paragraph 3). The Plaintiff questioned the validity of the 3rd Defendant's doctorate degree and his integrity, and took the view that he was not a fit and proper person to act as a Supervisor, principal, manager or teacher of the Schools. The nub of the complaints by the Plaintiff against the 1st and 4th Defendants is that they failed to verify the 3rd Defendant's qualifications, and wrongly allowed him to continue in office, despite the Plaintiff drawing the matter to their attention. They seek declarations that:

(1) the 3rd Defendant is not a fit and proper person to serve or continue to serve as the Supervisor, principal, manager and/or teacher of the Schools ("**Relief (a)**"); and

(2) the 1st and 4th Defendants breached their duty as pleaded in paragraph 1F of the RRRASOC, which was essentially a duty to the Plaintiff and/or under the EO to act reasonably to ensure that the reputation of the Schools is not damaged ("**Relief (b)**").

8. The action had originally been commenced against the 1st Defendant and the 2nd Defendant who was the Executive Secretary of the 4th Defendant. They applied to strike out the claim. By a decision of 4 May 2018 ("**DHCJ To's Decision**"), Deputy High Court Judge To allowed an appeal against the Master's decision to dismiss the strike out application, but only to the extent that the action against the 2nd Defendant be struck out. Deputy High Court Judge To also upheld the orders granting leave to the Plaintiff to join the 3rd and 4th Defendants in the action. Paragraph 1F of the RRRASOC and Relief (b) were not in the pleading at the time of the hearing before DHCJ To (or indeed at the time of the hearing before DHCJ Le Pichon referred to in the next paragraph).

9. The 3rd Defendant also applied to strike out the claim in October 2018, by which time he was no longer a Supervisor of the Schools. By a decision of 3 June 2020, Deputy High Court Judge Le Pichon allowed an appeal against the Master's decision to strike out the claim ("**DHCJ Le Pichon's Decision**").

10. The 1st and 4th Defendants say that the circumstances have changed since DHCJ To's Decision, as the 3rd Defendant is no longer a supervisor of the Schools. They say that any declaratory relief against them (the 1st and 4th Defendants) would be of no practical utility.

C. THE APPLICABLE PRINCIPLES

C1. Strike out

11. There was no dispute as to the applicable principles. These were summarised by Au-Yeung J in *Yifung Properties Ltd and other v Manchester Securities Corp and others*, unreported, HCA 1341/2014 and HCA 1359/2014, 19 October 2015, at [10] to [15]:

> "10. Striking out is a draconian remedy. A party should not lightly be denied his day in court. Accordingly, pleadings should be struck out only in clear and obvious cases. Disputed facts are to be taken in favour of the party sought to be struck out. The court should not decide difficult points of law in striking out proceedings. The claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out. The mere fact that the case is weak and not likely to succeed is no ground for striking it out. *Hong Kong Civil Procedure 2015*, §18/19/4.
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> 11. Where the limb of lack of reasonable cause of action or defence is relied on, no evidence is admissible. The court should only look at the pleadings and decide whether on the assumption that the facts as pleaded are true the cause has some chance of success: O. 18, r 19(2).
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> 12. A proceeding is "frivolous" when it is not capable of reasoned argument, without foundation or where it cannot possibly succeed: *Hong Kong Civil Procedure 2015*, §18/19/8. Where a litigant brings a claim knowing that there is no substance in it or that it is bound to fail, or if the claim is on its face so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of process: see *ET Marler Ltd v Robertson* [1974] ICR 72 at 76D-E. The court should see what the party in question knew or ought to have known if he had gone about the matter seriously: *Cartiers Superfoods Ltd v Laws* [1978] IRLR 315 at 317, §18.
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> 13. A proceeding is "vexatious" when it is oppressive and/or lacks bona fides: *Hong Kong Civil Procedure 2015*, §18/19/8. Vexatiousness implies the doing of something over and above that which is necessary for the conduct of the litigation, and suggests the existence of some spite, or desire to harass the other side to the litigation, or some other improper motive: *Cartiers Superfoods*, §16.

> 14. To decide that the litigant has been frivolous or vexatious and thus abused the process of the court is a serious finding to make, for it will generally involve bad faith on his part and one would expect the discretion to be sparingly exercised: *ET Marler Ltd v Robertson* [1974] ICR 72 at 76G-H.
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> 15. Each limb under Order 18, rule 19(1) forms a separate ground for striking out as is evidenced by the disjunctive "or". Accordingly, although a cause of action might appear to be reasonable on the face of a set of pleading, the court is at liberty to consider evidence and decide if the pleading should be struck out under another limb."

C2. Declaratory relief

12. The parties were largely in agreement as to the applicable principles, which were reviewed in DHCJ To's Decision at [15] to [19]. At [20] (which was cited with approval in *Convoy Global Holdings Ltd and another v Kwok Hiu Kwan and another* [2021] HKCA 1594 at [29] to [30]), DHCJ To summarised the position as follows.

> "Thus in summary, an applicant seeking to invoke the court's jurisdiction to grant declaratory relief has to show:
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> (1) that he has a real interest in the subject matter of the declaration (the real issue requirement);
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> (2) that he has a real interest in obtaining a declaration against the adverse party (the real interest requirement); and
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> (3) that the adverse party is a proper contradictor (the proper contradictor requirement)."

13. Mr Abraham Chan SC, counsel for the 1st and 4th Defendants, submitted that the modern approach, after the Civil Justice Reform, was to consider whether a declaration was justified as a matter of practical utility, citing *Convoy Global Holdings Ltd v Kwok Hiu Kwan* [2020] 4 HKLRD 222 at [53] (which in turn cited to DHCJ To's Decision at [17]); earlier authorities were to be treated with caution. In considering the utility of a

declaration to the claimant, the court should also take into account the inconvenience and embarrassment it might cause to the defendant.

14. Ms Bianca Yu, counsel for the Plaintiff, submitted that where proceedings have been commenced but the dispute between the parties comes to an end, this will not necessarily prevent the grant of declaratory relief if the action raised substantial issues when the proceedings were commenced and if the declaration sought would still serve some useful purpose, citing *Gibson v Union of Shop Distributive and Allied Workers* [1968] 1 WLR 1187 and *Marion White v Francis* [1972] 1 WLR 1423.

15. It seems to me that these are simply differences of emphases. A declaratory judgment is a flexible and discretionary remedy (see Zamir & Woolf, The Declaratory Judgment, 4th ed., para 4-01). Whether a declaration satisfies the requirement of "practical utility" in any one case will turn very much on its particular facts. As a consideration of the authorities reviewed in Zamir & Woolf under "The importance of a declaration serving a practical purpose" (paras 4-99 to 4-103), "What is a practical purpose?" (paras 4-104 to 4-109), "Termination of the dispute" (paras 4-121 to 4-127) and "Balance of convenience" (at para 4-128) shows, on the one hand, the court has always been reluctant to grant a declaration that would not serve any practical purpose; on the other hand, "useful purpose" has been interpreted in a broad and flexible sense.

16. In the present case, it is important not to lose sight of the fact that this is a strike out application, so that the issue is whether it is clear and obvious that the claims for declaratory relief are unsustainable.

D. THE 1ST AND 4TH DEFENDANTS' GROUNDS FOR STRIKING OUT

17. The 1st and 4th Defendants sought primarily to strike out the Plaintiff's claim for Relief (b). As summarised by Mr Chan SC, their arguments were that:

(1) the 1st and 4th Defendants did not owe a duty as alleged (so that the "real issue" requirement for declaratory relief was not satisfied);

(2) a private law action was not the way to enforce any such duty. It was an abuse of process for a litigant in the Plaintiff's position to pursue the 1st and 4th Defendants for such relief by way of private action; and

(3) the declaration sought was of no practical utility because it would not deal with the scenario of reappointment of the 3rd Defendant (so that the "real interest" requirement for declaratory relief was not satisfied), and because the burdens imposed by Relief (b) were substantial.

18. The 1st and 4th Defendants also sought to strike out the Plaintiff's claim for Relief (a) also, as:

(1) the 3rd Defendant was no longer a Supervisor of the Schools, and there was no factual basis to say that he would run for office or be appointed in the future;

(2) the 1st and 4th Defendants were prepared to undertake to abide by whatever ruling the court might eventually make against the 3rd Defendant in relation to Relief (a); and

(3) as with Relief (b), a private law action was not the proper way for the Plaintiff to seek the relief sought.

D1. Duty said to be owed by the 1st and 4th Defendants

19. The 1st and 4th Defendants' principal argument was that they did not owe a duty as alleged in paragraph 1F of the RRRASOC to ensure that the reputation of the Schools was not damaged. The "real issue" requirement was therefore not satisfied, as there was no "proper and sustainable basis" to seek declaratory relief based on the statutory regime, citing *Convoy* at [70].

20. Mr Chan SC submitted that the EO did not provide for a duty as pleaded by the Plaintiff; nor, given the extensive statutory regime, was there room for finding such a duty at common law.

21. Paragraph 1F of the RRRASOC is somewhat prolix. It starts by pleading that the 1st, 3rd and 4th Defendants owed a duty to the Plaintiff and/or under the EO to act reasonably to ensure that the reputation of the Schools is not damaged. It then elaborates on what this means:

(1) the reputation of the Schools would be damaged if a person of questionable integrity were to be appointed or continue as a Supervisor, principal, manager and/or teacher;

(2) the 1st, 3rd and 4th Defendants therefore have to ensure that intending candidates were of high integrity and have to verify the facts and matters declared by candidates, especially when provided with complaints supported with evidence;

(3) the 1st, 3rd and 4th Defendants must not allow a person of questionable integrity to be appointed or to serve as a supervisor, principal, manager and/or teacher; and

(4) a person of questionable integrity cannot be regarded as a fit and proper person, within the meaning of the EO, to be appointed as a supervisor, principal, manager and/or teacher of the Schools.

22. As regards the 1st and 4th Defendants, therefore, the essence of the plea in paragraph 1F of the RRRASOC is that they have a duty under the EO to ensure that candidates for appointment as supervisor, principal, manager and/or teacher of the Schools are fit and proper persons, and not to allow those who are not fit and proper to serve, or else the reputation of the Schools would be damaged.

23. In my view, it cannot be said that it is clear and obvious that the claim of such a duty is unsustainable (so that the "real issue" requirement is not satisfied).

24. The relevant provisions of the EO[1] are as follows.

(1) A manager of a school is a person who is registered as such under (*inter alia*) s.29 (s.3(1)).

(2) The management committee of a school consists of the managers of the school (s.3(1)). It is responsible for ensuring

[1] The various provisions of the EO referred to in this judgment are those applicable to a school without an incorporated management committee.

that (*inter alia*) the school is managed satisfactorily and that the EO is complied with (s.33).

(3) A supervisor of a school is a manager who is approved as a supervisor under (*inter alia*) s.34 or s.38(2) (s.3(1)).

(4) A sponsoring body of a school is a body approved in writing by the Permanent Secretary for Education ("**the Permanent Secretary**") to be such (s.3(1)).

(5) An intending manager of a school needs to apply for registration as such under s.29 EO. The Permanent Secretary may make such inquiry as he considers necessary and then either register the applicant or refuse to register him.

(6) Section 30 provides that the Permanent Secretary may refuse to register an applicant as a manager if it appears to the Permanent Secretary that (*inter alia*) he is not fit and proper to be a manager or is not acceptable as a manager to the majority of the managers (ss.30(1)(b), 30(2)).

(7) Section 31(2A) provides that the Permanent Secretary shall cancel the registration of a manager of a school if it appears to him that the manager is no longer acceptable as a manager of the school to the majority of the managers of the school.

(8) The Permanent Secretary may refuse to approve a person as the supervisor of a school if the Permanent Secretary is not satisfied that he is a fit and proper person to be the supervisor (s.35(1)).

(9) Section 37(d) provides that the Permanent Secretary may withdraw his approval of the supervisor of a school if it

appears to him that the supervisor is no longer acceptable as such to the majority of the management committee.

(10) Where the Permanent Secretary has approved a sponsoring body for a particular school, in exercising his powers under ss.30(2), 31(2A), 37(d), 38(2) and 38A(2) in respect of such a school, the Permanent Secretary shall, in addition to taking account of the views of the management committee, also take account of the views of the sponsoring body, but the Permanent Secretary does not have any duty to seek such views (s.72A(1)). The views of the sponsoring body shall be expressed by resolution of its board or governing body, and a copy of the resolution shall be sent to the Permanent Secretary (s.72A(2)). A sponsoring body may express its views on a matter relating to the provisions in s.72A(1) whether not the management committee has expressed its views on the matter, and, where the management committee has expressed its views on the matter, the views of the sponsoring body shall prevail (s.72A(3)).

25. Under s.72A, the sponsoring body of a school therefore may express its views on the acceptability of a manager or supervisor of the school, which could include the question of whether the manager or supervisor is fit and proper to serve as such. Whilst the issue of acceptability under s.31(2A) and s.37(d) is framed in terms of acceptability to the managers, it is notable that under s.72A, the sponsoring body may express its views whether or not the management committee has expressed its views, and that in any event, its views prevail over any views expressed

by the management committee. It is also notable that the sponsoring body may express its views whether or not the Permanent Secretary has asked for them.

26. In my view, on the basis of the pleaded circumstances that:

(1) the 4th Defendant administered and controlled the Schools, and had ultimate control of their management and affairs (as pleaded in RRRASOC paragraph 1C);

(2) the 4th Defendant was aware that concerns had been raised about the integrity of the 3rd Defendant (as pleaded in RRRASOC paragraph 13);

it cannot be said that it is plain and obvious that the Plaintiff would fail in its claim that the 4th Defendant ought to have taken steps to remove the 3rd Defendant as supervisor of the Schools (for example by expressing views to the Permanent Secretary as to his acceptability as supervisor and manager).

27. I would further note that in DHCJ To's Decision, he expressed the view that the 1st and 4th Defendants had a duty to ensure that the supervisor of the Schools was a fit and proper person, and to remove him if he was no longer fit and proper or was otherwise unacceptable, by reference to 4th Defendant's articles of association and on a proper construction of s.38 EO (see [32], [34], [35], [36], [47]). The 1st and 4th Defendants did not seek to suggest that DCHJ To's Decision was wrong. Rather, their argument was that (a) circumstances had changed since that decision as the 3rd Defendant was no longer a supervisor of the Schools,

and (b) the duty pleaded in RRRASOC paragraph 1F, and Relief (b), was not in the pleading at the time of DHCJ To's Decision.[2]

(1) As to (a), the fact that the 3rd Defendant is no longer a supervisor of the Schools would not have any impact on the question of whether the 1st and 4th Defendants have any duty to ensure that appointees to the post are fit and proper persons, and whether they were in breach of that duty in (allegedly) failing to act to remove the 3rd Defendant as supervisor. (It may be noted that as a matter of language, Relief (b) seeks a declaration as to a past breach.) Whether the 3rd Defendant's change in status might strip declaratory relief of any practical utility is a different issue, to which I return below.

(2) As to (b), the 1st and 4th Defendants sought to narrowly frame the duty pleaded in RRRASOC paragraph 1F as being a duty to ensure that the reputation of the Schools is not damaged. This however misses the essence of the plea in RRRASOC paragraph 1F, which is that the 1st and 4th Defendants had a duty to ensure that candidates for appointment to various positions in the Schools were fit and proper persons, and to prevent those who were not fit and proper to serve, so as not to damage the reputation of the Schools.

28. In other words, the 1st and 4th Defendants seek to sidestep, rather than to challenge, the views expressed by DCHJ To that the 1st and 4th Defendant did have a duty to ensure that the supervisor of the Schools was

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[2] Skeleton of 12 January 2022 at paragraphs 4(4) and 6; Note of Oral Reply Points of 14 January 2022 at paragraph 13.

a fit and proper person, and to remove him if he was no longer fit and proper or was otherwise unacceptable. Given that RRRASOC paragraph 1F in essence seeks to plead such a duty, and given the 1st and 4th Defendants do not challenge DCHJ To's Decision, it cannot be said that the existence of such a duty is unarguable.

29. The other arguments advanced in support of the contention that no duty arose under RRRASOC paragraph 1F do not take the 1st and 4th Defendants' case further.

(1) It was said that the EO did not impose any duty on anyone to ensure that the reputation of a school is not damaged, not least because "a school's reputation is a highly subjective thing". As mentioned above, this misses the essence of the plea in RRRASOC paragraph 1F, which was that the 1st and 4th Defendants had a duty to ensure that candidates for appointment to various positions in the Schools were fit and proper persons, and to prevent those who were not fit and proper to serve, so as not to damage the reputation of the Schools.

(2) It was said that the EO did not impose a duty on a sponsoring body towards school alumni or donors, and that the Plaintiff's reliance on s.33 EO was misplaced, as this was directed towards the management committee and not a sponsoring body. These points do not address the provisions of s.72A EO, which provide for the sponsoring body to express views as to the acceptability of a manager or supervisor in its own right.

Nor do they address the construction of the EO provisions as set out in DHCJ To's Decision.

30. I therefore do not agree that it is unarguable that the 1st and 4th Defendants had a duty under the EO to ensure that candidates for appointment to various positions in the Schools were fit and proper persons, and to prevent those who were not fit and proper to serve, so as not to damage the reputation of the Schools.

D2. Whether abuse of process to pursue private action

31. Mr Chan SC submitted that it was for the Permanent Secretary, rather than a disgruntled alumnus, to take action in the event of mismanagement of a school. The Plaintiff's action was an abuse of process in that it sought to bypass the statutory mechanism under the EO for dealing with matters of mismanagement. Extensive powers had been given to the Permanent Secretary enabling him to investigate a school's affairs and take remedial measures. In the event that the Permanent Secretary failed to act, the mode of redress lay in an application for judicial review. Accordingly, it was said, the claims for both Relief (a) and Relief (b) were an abuse of process.

32. This argument was similar to one made to DHCJ To (in the context of Relief (a)) and which he rejected. As DHCJ To observed, it is not the public duty of the Permanent Secretary to actively involve himself in the management of a school or appointment of its supervisor; these are functions within the realm of the management committee. The role of the Permanent Secretary is a passive one, being to approve the appointment of

the supervisors recommended by the sponsoring body or management committee, subject to a residual power to screen out anyone he regards as not fit and proper. It is not for the Permanent Secretary to police the discharge of the management committee's duty by regularly reviewing whether the supervisor is a fit and proper person or continues to be acceptable by the management committee. The Plaintiff's complaint was not against the Permanent Secretary, but against the Defendants for not taking action. See DHCJ To's Decision at [32] to [35], with which I respectfully agree.

33. Mr Chan SC further submitted that if the Plaintiff wanted redress, the proper route was through the EO. However, the EO provides no mechanism for someone in the position of the Plaintiff to require the Permanent Secretary to intervene in and investigate the affairs of a school. In any event, under the EO, the primary responsibility for managing a school lies with its management committee, not the Permanent Secretary.

D3. Whether declaration in Relief (b) of practical utility; whether Relief (b) would impose substantial burdens on the 1st and 4th Defendants

34. I will deal the third and fourth arguments in relation to Relief (b) together, namely that the declaration sought was of no practical utility, so that the "real interest" requirement was not satisfied, and the burdens imposed by the relief sought were substantial.

35. The argument is that there is no practical utility in the declaration under Relief (b) as the 3rd Defendant is no longer a supervisor of the Schools, having been replaced in September 2018. It is said that this renders academic any declaration regarding the earlier appointment or

continuation of the 3rd Defendant as supervisor (prior to September 2018). It is further said that if the Plaintiff's concern is simply to establish that the 3rd Defendant is not fit and proper as a supervisor, it is a disproportionate burden for the 1st and 4th Defendants to have to take part in the litigation.

36. I do not agree that it is clear and obvious that there would be no practical utility in this declaration, or that the Plaintiff's claim for the relief places a disproportionate burden on the 1st and 4th Defendants.

(1) The Schools continue to be administered and controlled by the 4th Defendant, of which the 1st Defendant is a director. Whether the approach taken by the 1st and 4th Defendants to the Plaintiff's complaints about the Schools' supervisor was an approach which complied with the EO could quite conceivably inform how the 4th Defendant and its council members approach any similar complaints in future, and how candidates for the post of supervisor or manager at the School should be assessed by the 4th Defendant and its council members in future.

(2) The Plaintiff, who has donated substantial sums to the Schools via the 4th Defendant, for the purpose of maintaining and enhancing the reputation of the Schools (as pleaded in RRRASOC paragraph 1D), has a legitimate interest in knowing whether the approach taken by the 1st and 4th Defendants to his complaints was one which complied with the EO, as it could quite conceivably inform his future conduct in supporting the Schools or in dealing with future

candidates for the post of supervisor or manager of the Schools.

(3) The claim for Relief (b) therefore goes beyond the issue of whether the 3rd Defendant was historically a fit and proper supervisor during the terms in which he served. It cannot be said that the claim only touches upon the 1st and 4th Defendant's roles in a peripheral manner, such that it is disproportionate for them to be involved in the litigation.

D4. Relief (a)

37. The 1st and 4th Defendants argued that there was also no practical utility in the declaration under Relief (a) as the 3rd Defendant has been replaced, and whether he might be appointed in the future is speculative.

38. However, it is not inconceivable that the 3rd Defendant might seek to be elected to a position at the Schools in the future. RRRASOC paragraph 16 pleads that despite the serious allegations against the 3rd Defendant as to his lack of integrity and his false representations as to his academic qualifications, which were supported by evidence, the 3rd Defendant continued to stand for election, and was appointed as supervisor of the Primary School for the terms commencing 1 September 2016 and 1 September 2017. He was also elected as Supervisor of the Primary School for the term commencing 1 September 2018. The evidence is that the standing committee of the council of the 4th Defendant blocked the nomination of the 3rd Defendant as school supervisor of the Primary School and the Middle School, and another school supervisor was nominated. If

the 3rd Defendant were to successfully seek election on a future occasion, whether the 4th Defendant might have a change of mind and support his appointment could not be ruled out (cf. DHCJ Le Pichon's Decision at [71]).

39. At the hearing, Mr Chan SC sought to address this by indicating that the 1st and 4th Defendants took a neutral stance as regards the outcome of the Plaintiff's claim for Relief (a) as against the 3rd Defendant, and by offering an undertaking that the 1st and 4th Defendants would abide by the terms of any declaration made against the 3rd Defendant in this regard. Ms Yu acknowledged that this would indeed address the concern that the 1st and 4th Defendant might ignore any declaration insofar as it was made against the 3rd Defendant only (and proceed to appoint him to a managerial position in the Schools), there not having been evidence filed up to that point to indicate otherwise. She submitted, however, that it did not address the other purpose for which the declaration was sought, which was to obtain guidance as to how an application for a position at the Schools should be dealt with in the event that the applicant's qualifications were doubtful. However, a declaration as to whether the 3rd Respondent is, on the facts, a fit and proper person to serve in a position with the Schools would not provide guidance as to the approach which the 4th Defendant or members of its council should adopt in dealing with applications for positions at the Schools. Indeed, it would not even directly address the issue of whether the approach adopted by the 1st and 4th Defendants in relation to the case of the 3rd Respondent was a proper one.

40. In these circumstances, I agree that it is plain and obvious that there would not be any practical utility remaining for the Plaintiff to pursue

Relief (a) against the 1st and the 4th Defendants. Accordingly, on the basis of the 1st and 4th Defendants' undertaking, I strike out this part of the claim.

E. DISPOSITION

41. I therefore strike out the Plaintiff's claim against the 1st and 4th Defendants for Relief (a), on the basis that the 1st and 4th Defendants undertake to abide by the terms of any declaration made against the 3rd Defendant in relation to Relief (a). The parties should seek to agree the precise wording of the undertaking, and submit a draft order for approval within 14 days from today. In the event that the parties are unable to agree on the order, each party should submit his respective draft order, giving reasons for disagreeing with the other parties' draft. I will thereafter determine the matter on the papers, unless a party raises an objection to such a course, with supporting reasons.

42. I dismiss the remainder of the 1st and 4th Defendants' summons of 22 July 2021.

43. Whilst I have struck out the Plaintiff's claim against the 1st and 4th Defendants for Relief (a), this was on the basis of an undertaking which was offered only in the course of submissions made at the hearing. I therefore make a costs order *nisi* that the 1st and 4th Defendants pay the costs and occasioned by their summons of 22 July 2021 to the Plaintiff, to be taxed if not agreed.

(Yvonne Cheng)
Judge of the Court of First Instance
High Court

Ms Bianca Yu, instructed by V. Hau & Chow, for the Plaintiff

Mr Abraham Chan SC leading Mr Richard Yip and Mr Keith Cheung, instructed by Or & Partners, for the 1st and 4th Defendants

Attendance of the 3rd Defendant was excused